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No. 71-714

In the Supreme Court of the United States

OCTOBER TERM, 1971

JUAN PEDRO FARINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction is reported at 448 F. 2d 1334 (Pet. App. 27a). The opinion of the district court denying petitioner's post-trial motions is unreported (Pet. App. 25a). The opinion of the district court denying petitioner's motion to dismiss the second indictment is reported at 308 F. Supp. 459 (Pet. App. 10a). The opinion of the district court dismissing the first indictment is reported at 299 F. Supp. 852 (Pet. App. 1a).

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1971. Mr. Justice Marshall extended the time for filing a petition for certiorari to November 27, 1971, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Selective Service regulation requiring prospective inductees to obey the orders of armed forces personnel at the induction station is unconstitutionally vague or was unconstitutionally applied here.

2. Whether that regulation is within the scope of powers Congress has delegated, and may permissibly delegate, to the executive.

3. Whether petitioner's conviction for refusal to submit to induction can be sustained where petitioner's uncooperative behavior made it necessary to oust him from the induction station before he was given the order to take "one step forward".

4. Whether petitioner's conviction for hindering and interfering with the administration of the Selective Service by making speeches, distributing literature, and engaging in boisterous and unruly behavior disruptive of the processing of other registrants impermissibly infringed petitioner's First Amendment rights.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a three-count indictment charging (1) that he failed to obey the orders of representatives of the Armed Forces assigned to the military installation where his induction was to be accomplished, in violation of 50 U.S.C. App. 462(a) and 32 C.F.R. 1632.14(b)(4); (2) that he failed to report for and submit to induction in violation of 50 U.S.C. App. 462(a) and 32 C.F.R. 1632.14; and (3) that he hindered and interfered with the administration of the Military Selective Service Act of 1967, by engaging in activity disruptive of the processing of other registrants, in violation of 50 U.S.C. App. 462(a). Petitioner was sentenced to imprisonment for two years on each of the three counts, to be served concurrently, with a recommendation that he be considered for parole after six months pursuant to 18 U.S.C. 4208(a)(1) (Tr. 250).[1]

On August 13, 1968, the day he was ordered to report for induction, petitioner participated in an early-morning demonstration of approximately 50 persons outside the induction station. The demonstrators carried signs, picketed, and chanted slogans indicating opposition to the war in Viet Nam (Tr. 21). At approximately 7:15 A.M. petitioner entered the induction station carrying leaflets expressing opposition to

[1] "Tr." refers to the trial transcript.

the draft and to the war in Viet Nam (Gov. Ex. 3, Tr. 22, 25, 28, 263).

He was met at the door by Captain James Kenny, the chief processing officer at the center, who had concluded that petitioner was the focal point of the demonstration (Tr. 21, 23). Captain Kenny and Sergeant Bereza, a processing officer, took petitioner to Sergeant Bereza's office, Room 203, so that he might be counseled "before things even began of what might happen should he be declared uncooperative." (Tr. 22–23, 43).

Sergeant Bereza advised petitioner that since his distribution of literature would disrupt processing and possibly lead to violence because of objections by some registrants to having literature forced on them (Tr. 90), he would have to surrender his leaflets until he was finished processing (Tr. 77). Sergeant Bereza told petitioner that he could distribute leaflets on his lunch break outside of the building (Tr. 91). When petitioner insisted that he had a constitutional right to distribute leaflets and that the literature was his property, Sergeant Bereza permitteed him to retain possession of the literature, with the warning, however, that any abuse of this privilege could result in his being declared an uncooperative registrant (Tr. 77). The pertinent regulations were read to petitioner and also given to him to read, and he was asked if he had any questions. He did not (Tr. 78).

Petitioner was then permitted to enter Room 204, a large room serving as a control center in which registrants are ordered to report initially for orientation

(Tr. 47, 48, 95, 96). In Room 204, petitioner distributed his literature and talked to the other registrants (Tr. 79). Sergeant Bereza appeared and asked petitioner to refrain from such conduct, explaining that petitioner was interrupting processing and, that because of the large number of people, a "smooth flow" was required. He asked petitioner to come with him to his office, which adjoined Room 204 (Tr. 79). Petitioner did not follow him, but continued passing out literature and talking to the other registrants (Tr. 80). After Sergeant Bereza returned to Room 204 and again unsuccessfully ordered petitioner to go to Room 203, a brief scuffle ensued between the two during which "[e]verything was disrupted." Captain Kenny was summoned (Tr. 80–81).

Captain Kenny counseled petitioner pursuant to Army Regulation 601–270,[2] advising him that "the distributing of leaflets [and] making speeches, would not be tolerated to the extent that it would interfere with his induction processing and also induction processing of the other individuals who were in the building at the time" (Tr. 26). Petitioner was informed that if he engaged in such disruptive speechmaking and distribution of literature, he would be declared an uncooperative registrant subject to criminal prose-

[2] AR 601–270 ¶ 3–31(c)(2) is set out in the margin of the court of appeals opinion (Pet. App. 30a). This regulation provides for special counseling whereby a registrant indicating his intent to refuse to comply with instructions concerning processing, or who refuses to take part in the processing, is taken aside and advised of the possible consequences of his action. He is then given a second chance. *United States* v. *Trimm*, 416 F. 2d 1145, 1149 (C.A. 2).

cution. Petitioner replied, "I don't intend to cooperate with you or anybody else in this building" (Tr. 26). Captain Kenny then left (Tr. 27).

About ten minutes later, Captain Kenny was summoned to Room 206, a room in which Armed Forces personnel and registrants were engaged in filling out and checking various forms (Tr. 27, 60). Captain Kenny found petitioner standing in front of a group of registrants "talking in a very loud boisterous manner, telling them they did not have to cooperate with us, the war was an immoral war, et cetera" (Tr. 27, 60). Captain Kenny approached petitioner, stating "'Mr. Farinas you are going to have to stop. I counselled you just a few minutes ago and told you what would happen' " (Tr. 27). Captain Kenny testified that petitioner "refused to stop, he didn't even stop yelling and screaming to listen to me, so I removed the individuals sitting there, sent them to another room." (Tr. 27, 64). Captain Kenny then declared petitioner to be an uncooperative registrant, and escorted him down the stairs and out the building (Tr. 27, 65). Petitioner continued making his speeches and distributing literature to individuals he passed on the stairs (Tr. 66).

ARGUMENT

1. Petitioner argues that 32 C.F.R. 1632.14(b)(4) which requires prospective inductees "to obey the orders of the representatives of the Armed Forces" at the induction station is unconstitutionally vague.

The regulation is limited in time and place and persons affected. It authorizes Armed Forces person-

nel *at* the induction station to issue appropriate orders *to* potential inductees *during* the induction process to facilitate their processing. The regulation serves the important governmental interest of preserving order in the operation of an induction station, is unrelated to any effort to control expression, and only incidentally restricts its exercise. See *United States* v. *O'Brien*, 391 U.S. 367, 376; *Callison* v. *United States*, 413 F. 2d 133, 136 (C.A. 9); cf. *Adderley* v. *Florida*, 385 U.S. 39.

Both courts below held that the regulation could not be employed to limit speech beyond what is practically required, and noted that the regulation was by its very context narrow in time, place, and persons affected. Cf. *Cox* v. *New Hampshire*, 312 U.S. 569.

Despite the opportunity to do so, petitioner has made no showing that the orders he disobeyed were not necessary to the orderly conduct of the induction process, and there was ample evidence that they were necessary (Pet. App. 26a–35a).

Petitioner lacks standing to raise other hypothetical unconstitutional applications and, moreover, has made no showing of improper administration of the regulation in other circumstances. See *Callison* v. *United States*, *supra*; *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2), certiorari denied, 396 U.S. 835.

2. Petitioner argues that 50 U.S.C. App. 460 (b)(1) and (c), pursuant to which the challenged regulation was promulgated, constitute an impermissible delegation of legislative power (Pet. App. 13a–14a, 35a–36a).

Sections 460(b)(1) and (c) authorize the President and his delegates "to prescribe the necessary rules and regulations to carry out the provisions of [the Selective Service Act]." Section 462(a) makes it a criminal offense knowingly to fail to perform any duty as established by such rules and regulations.

The propriety of delegating to the President the power to make rules and regulations for administering the draft law has long been established. See *e.g., Selective Draft Law Cases* (*Arver* v. *United States*), 245 U.S. 366.

As the court of appeals held, the delegation to military personnel at the induction station of the power to give necessary orders is an appropriate exercise of the delegated power (Pet. App. 35a–36); the protection it affords to the induction process is "necessary" to carry out the provisions of the Act. The limited discretionary power conferred on officials to give appropriate orders with penalties for disobedience raises no substantial question as to an impermissible delegation of legislative power.

Petitioner also contends that Congress never intended that a violation of 32 C.F.R. 1632.14(b)(4) be made criminal. But, as the district court observed, (Pet. App. 15a), 50 U.S.C. App. 462(a) itself provides that it is a crime to "knowingly fail or neglect or refuse to perform any duty required * * * under * * * the rules or regulations made pursuant thereto." The regulation creates a duty, backed by criminal sanctions under 50 U.S.C. App. 462(a), since it explicitly provides that "(b) Upon reporting for induction, it

shall be the *duty* of the registrant * * * (4) to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished * * *" (32 C.F.R. 1632(b)(4); emphasis added).

3. Petitioner argues that his ouster from the induction station prior to his final induction ceremony precludes his conviction for failure to submit to induction. But his own actions so frustrated the orderly induction process that it became impossible for him to be treated in accordance with the regulations. After being counselled by Captain Kenny, petitioner stated: "I don't intend to cooperate with you or anybody else in this building" (Tr. 26), and then continued his disruptive activities until he was declared uncooperative and removed from the building. Given his actions, it is of no consequence that petitioner was not formally offered induction. *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2), certiorari denied, 396 U.S. 835; *United States* v. *Trimm*, 416 F. 2d 1145 (C.A. 2).[3]

4. Petitioner contends that his conviction under Count V cannot stand. This count charged that petitioner "by force and violence and otherwise hindered and interfered with the administration of the Military

[3] Petitioner's case does not present any conflict with *United States* v. *Kroll*, 402 F. 2d 221 (C.A. 3), certiorari denied, 393 U.S. 1043, or *Chernekoff* v. *United States*, 219 F. 2d 721 (C.A. 9). *Kroll* merely states the usual rule that the final induction ceremony must be followed before a registrant is guilty of a crime, and the case did not involve a disruptive registrant like petitioner who made the ceremony impossible. In *Chernekoff* it was held that the final induction ceremony must be followed "unless the selectee himself makes it impossible" (219 F. 2d at 725).

Selective Service Act * * * [by persisting in] * * * making speeches, distributing literature, and engaging in boisterous and unruly behavior" (Pet. App. 9a), Petitioner contends that he was "never violent" and appears to cite *Bagley* v. *United States*, 136 F. 2d 567 (C.A. 5), for the proposition that proof of force and violence or their substantial equivalent was required. This proposition has been rejected in *United States* v. *Eberhardt*, 417 F. 2d 1009, 1013 (C.A. 4), certiorari denied *sub nom. United States* v. *Berrigan, et al.*, 397 U.S. 909, where the Court noted that: "The words 'or otherwise' were added by section 12 of the Selective Service Act of 1948 * * * to relieve the prosecution from the obligation to prove the use of aggressive force or violence."

As discussed above, the record clearly shows that petitioner's activity disrupted the induction process of himself and other registrants. Captain Kenny testified that because of petitioner's activities, "we could not process these individuals further" and the other inductees were sent to another room. (Tr. 27.)

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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